Appendix A

United States Court of Appeals
for the Ninth Circuit

Continental Ore Company, a Partnership; and Henry J. Leir, Erna D. Leir, Lina Schloss, as Individuals and as Partners under the trade name and style of Continental Ore Company, Appellants, vs. Union Carbide and Carbon Corporation; United States Vanadium Corporation; Electro Metallurgical Company; Electro Metallurgical Sales Corporation; Electro Metallurgical Company of Canada, Limited; Vanadium Corporation of America, Appellees.	No. 16,149 March 22, 1961

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: Merrill and Magruder, Circuit Judges, and Solomon, District Judge.

Magruder, Circuit Judge.

Plaintiffs filed in the court below a treble damage antitrust complaint against defendants. Plaintiffs, a partner-

ship and the partners in it suing individually, are the successors in interest to a family corporation known as Continental Ore Corporation. Both the plaintiff partnership, Continental Ore Company, and the previous corporation will be referred to as Continental.

The guiding light in Continental has been and still is the plaintiff Henry J. Leir. Leir was born in Germany and entered the ore and metal business there. His enterprises in Germany involved for the most part the purchase of raw materials for metal producers and the sale of their finished products. Upon Hitler's rise to power Leir moved to Luxembourg, where he formed a company known as Société Anonyme des Minerais. This corporation subsequently entered into a joint venture with the Société d'Electro-Chimie de Brignoud, a French company otherwise known as Fredet-Kuhlmann. Brignoud undertook to install equipment for the production of ferrovanadium and other alloys by a process known as the alumino-thermic method; Minerais supplied the raw materials, and the profits were split evenly. In 1938 Leir moved again, this time to the United States. He organized the Continental Ore Corporation in 1939 under the laws of the State of New York.

The defendants named in the complaint are Union Carbide and Carbon Corporation, a New York corporation, United States Vanadium Corporation, a Delaware corporation, Electro Metallurgical Company, a West Virginia corporation, Electro Metallurgical Sales Corporation, a New York corporation, Electro Metallurgical Company of Canada, Ltd., a Canadian corporation, and Vanadium Corporation of America, a Delaware corporation. Several

other persons, whose names were unknown to the plaintiffs, were listed as Doe defendants.

The complaint states that, by means of a combination and conspiracy in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, defendants eliminated the plaintiffs and their predecessor in interest, the Continental Ore Corporation, hereinafter included in the term plaintiffs, from the business of producing, selling and distributing vanadium oxide and ferro-vanadium. Plaintiffs claim that they made several forays into the vanadium industry, sometimes approaching the brink of success, other times not getting quite so far. Their inability to reach the desired goal in any of their various vanadium undertakings is the gist of their complaint. They ascribe their failures to defendants' alleged unlawful course of conduct.

Vanadium is a rare metallic element found for the most part in carnotite and roscolite ores. These vanadium-bearing ores are taken from the mines to the mills where they are "crushed," "roasted" and "leached" to form a substance called red cake. The red cake is then fused into a black oxide, which is called vanadium oxide, vanadic acid, vanadium pentoxide, or V_2O_5. This oxide is then converted into ferro-vanadium through the application of great heat either by means of an electric furnace or by the alumino-thermic process. The ferro-vanadium thus produced is used by steel makers in the steel bath to add toughness and tensile strength to the steel.

According to the complaint, the defendants frustrated the plaintiffs' sallies into the vanadium field in five particulars:

(1) In 1938 Leir negotiated a contract between Apex Smelting Company of Chicago (hereinafter "Apex") and Société d'Electro-Chimie de Brignoud, the French corporation. Subsequently the plaintiffs were assigned one half of Brignoud's interest under the contract. The agreement provided that Apex was to build and operate a ferro-vanadium plant, using Brignoud's alumino-thermic method of conversion. Brignoud was to contribute the secrets of this process as its part of the project. Since the profits were to be divided equally between the two signatories to the agreement, the plaintiffs, as a result of the assignment to them, became entitled to one quarter of the profits realized from the arrangement. Plaintiffs were also appointed exclusive sales agents throughout most of the United States for the ferro-vanadium to be manufactured by Apex.

Production under this agreement was not actually begun by Apex until April, 1940. The agreement was terminated by Apex in the spring of 1942. According to the complaint, Apex ceased operations in ferro-vanadium and canceled the aforesaid agreement because a sufficient supply of oxide could not be obtained, this being attributed to defendants' antitrust violations. More specifically, in pursuance of their illegal combination and conspiracy, defendants were said to have refused to sell enough oxide to Apex and also to have prevented Apex from acquiring the necessary quantities of raw materials from other suppliers.

(2) In 1942, after the termination of the unfortunate Apex joint venture, the plaintiffs transformed rented

premises on Long Island, New York, and there packaged a vanadium compound made up of vanadium oxide and small amounts of other materials. This compound, which was sold under the trade name Van-Ex, was designed for direct use in the steel bath where it could be converted into ferro-vanadium and mixed into the steel in one operation, thereby obviating the need to produce ferro-vanadium by a separate procedure. In 1944 the sale of Van-Ex was discontinued because, according to plaintiffs' allegations, defendants' antitrust violations precluded the acquisition of sufficient oxide and ore. It is claimed that defendants refused to sell to the plaintiffs and prevented their securing raw materials elsewhere.

(3) During 1942 the plaintiffs sold substantial quantities of ferro-vanadium, apparently produced by Apex, and of Van-Ex to a Canadian company, Atlas Steels, Ltd. These sales ceased during 1943 because, as alleged, defendants agreed with Electro Metallurgical Company of Canada, Ltd., a wholly owned subsidiary of defendant Union Carbide, and the wartime agent of the Canadian Government for the purchase and allocation of vanadium products to Canadian steel firms, to eliminate Continental from the Canadian market. Pursuant to the agreement Electro Metallurgical Company of Canada refused, while exercising its powers as an agent of the Canadian Government, to purchase for and allocate to Canadian steel makers vanadium products made by the plaintiffs.

(4) During 1943, by threats of reprisals defendants allegedly forced the termination of contractual negotiations between Climax Molybdenum Corporation and the plaintiffs.

(5) In 1944 plaintiffs and Imperial Paper & Color Corporation entered into a contract much like the Apex arrangement above described, but providing in addition for the milling of oxide from vanadium ore. Imperial abandoned this contract before the production stage was ever reached because, according to the allegations, neither Imperial nor Continental was able to secure either ore or oxide with which to work as a consequence of defendants' refusal to sell supplies to them and of their actions which precluded the purchase of the same from other persons.

These five particulars by which defendants' alleged monopoly was purportedly furthered at Continental's expense are given as the reason for plaintiffs' assertion that after 1944 they could no longer operate profitably in the vanadium business. The complaint does not recite any particular activities by the defendants against the plaintiffs after 1944. In summary, plaintiffs complain that defendants conspired and combined to monopolize the production and sale of vanadium oxide and ferro-vanadium; that in pursuance of this monopolistic scheme defendants refused to supply vanadium oxide to the plaintiffs to carry on the business of producing ferro-vanadium; that defendants similarly refused to sell to plaintiffs sufficient vanadium oxide to continue the business of processing, packaging and selling Van-Ex; and that, in the course of their unlawful monopolistic conspiracy, defendants coerced the defection of one of plaintiffs' Canadian customers for ferro-vanadium and Van-Ex, namely, Atlas Steels, Ltd.; and moreover that defendants defeated the efforts by plaintiffs to enter into a successful arrangement with Climax Molybdenum Company for the produc-

tion of ferro-vanadium. The complaint states that, owing to all this,

> "Plaintiffs have lost business; the value of their trade-marks has been diminished; markets and customers which they have obtained in open competition with defendants have been taken away from them; their investments have been lost; the good will attaching to the business of Continental has been impaired—all to the damage of plaintiffs in the sum of Five Hundred Twenty-Eight Thousand Dollars ($528,000)."

This amount the plaintiffs estimate they would have made from their various vanadium ventures had not the defendants committed the above listed acts, as part of their unlawful conspiracy.

At the conclusion of the plaintiffs' case, and also when all the evidence was in, defendants moved for a directed verdict on the ground that there was insufficient evidence to establish the plaintiffs' claim to relief. The court took the motion under advisement but submitted the case to the jury, which reported a verdict for the defendants, with which verdict the trial judge noted his concurrence. Pursuant to this verdict the trial judge, on June 25, 1958, entered his judgment stating that "the plaintiffs take nothing by their complaint and that the same be dismissed and that the defendants have judgment on the verdict against the plaintiffs". It is this judgment which is now before us on appeal by the unsuccessful plaintiffs.

An appellate court reviews judgments, not the reasons which may be given in their support. It is only common sense that if, on the record before us, we determine that

the judgment is correct, it should be affirmed, regardless of the correctness of the reasons which may be given to support it. Suppose that the trial judge had decided to direct a verdict for the defendants. He would, in that event, have entered a judgment to the same effect as the one under review. If we conclude that the trial judge should have granted defendants' motion for a directed verdict, we should affirm the judgment as rendered, whatever errors appellants may convince us were made by the judge during the trial.

This proposition is well settled on the authorities. See *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924); *Stroud v. Benson*, 254 F.2d 448, 451 (C.A. 4th, 1958); *Lady Nelson, Ltd. v. Creole Petroleum Corp.*, C.A. 2d, decided January 19, 1961. We think that the Fifth Circuit was quite wrong in *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841 (1959), in holding that the foregoing rule was required to be modified or rendered inapplicable by the reasoning of the Supreme Court in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947). This last-named case dealt with quite a different situation, namely, the power of an appellate court upon *reversal* of the district court where the losing party below had not moved for a judgment n.o.v. or, in the alternative, for a new trial, as provided in Rule 50(b) F.R.C.P. In the present case we propose to *affirm* the judgment of the district court. As late as 1957 the Supreme Court said, in *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), that, "A successful party in the District Court may sustain its judgment on any ground that finds support in the record," without any suggestion that this

statement had to be modified to meet the reasoning of *Cone v. West Virginia Pulp & Paper Co.*, supra.

In fact, in the situation presented we do not see how we could do otherwise than affirm the judgment under review if we would obey the commands of 28 U.S.C. § 2111 and Rule 61 F.R.C.P. If we conclude that the trial judge should have granted defendants' motion for a directed verdict, it is not apparent how any alleged error at the trial could be deemed to "affect the substantial rights of the parties" within the meaning of both 28 U.S.C. § 2111 and Rule 61. In reaching our decision we shall look not only at all the evidence admitted by the trial judge, but also at all the evidence offered by plaintiffs but excluded below.

In a treble damage action under 15 U.S.C. § 15, it is clear that the plaintiff, in order to make out a claim on which recovery might be had, has the burden of proof to establish the following elements of his case: (1) That the defendant has violated the antitrust laws; (2) that plaintiff has suffered an injury to his business or property susceptible of being described with some degree of certainty in terms of money damages; and (3) that a causal connection exists between the defendant's wrongdoing and the plaintiff's loss. See, generally, Comment, 61 Yale L. J. 1010, 1011-28 (1952). Although in the instant case the defendants challenged the sufficiency of the evidence as to the three elements of the plaintiffs' case, we shall first direct our analysis to the third element, the sufficiency of the evidence as to causation, because defendants' strongest argument seems to us to apply here. Of course, a failure by the plaintiffs to prove any one of the three ele-

ments of their case would require the trial judge to direct a verdict for the defendants.

For present purposes we shall assume that the evidence was adequate to support a jury finding that the defendants committed the violations of the Sherman Act claimed, and that the defendants did the acts mentioned as part of a plan to monopolize the marketing of ferro-vanadium. Our problem is to determine whether or not the evidence could have justified jury findings that defendants' alleged illegal acts were in fact the cause of the plaintiffs' failure in various adventures into the business of producing and selling ferro-vanadium and Van-Ex. We have come to the conclusion that the evidence offered by the plaintiffs was insufficient to justify a jury verdict that this necessary causal relation existed, and therefore that the trial judge should have directed a verdict for the defendants.

As the First Circuit recognized in *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37, 42-43 (1948):

> "The degree of certainty required of a plaintiff in proving causation of damages is necessarily elastic. It varies with the nature of the case. Particularly in an anti-trust suit, covering as it must many imponderables, rigid standards of precise proof would make a plaintiff's task practically hopeless.
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> "To sum up: It is well appreciated that a plaintiff has a difficult task in anti-trust suit and that adherence to strict requirements of proof as to exact quantity of damage may deprive him of the substance of his rights. The law has gone far to ease that burden by permitting proof of losses which border on the

speculative, in order to implement the policy of the anti-trust laws. But a fair degree of certainty is still essential to show the causative relation of defendants' misconduct and plaintiff's injury."

No doubt, a plaintiff's difficulties of proof may be somewhat mitigated by a rule much akin to the doctrine of *res ipsa loquitur:* where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). See also *Eastman Kodak Company of New York v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). See *Martin v. Herzog*, 228 N.Y. 164, 170-171, 126 N.E. 814, 816 (1920).

But we are not sure that *Bigelow v. RKO Pictures, Inc.*, supra, is applicable in the instant case. Appellants have complained of the loss of a few named, specific, business arrangements rather than a general loss inflicted by the defection of countless, individual customers. Direct evidence of causation was readily available to Continental, while in the case cited such direct evidence was practically impossible to come by. See, generally, Clark, "The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits," 52 Mich. L. Rev. 363 (1954). Yet, even if the *Bigelow* decision could be enlisted to serve appellants' purposes, it was still incumbent upon them to show on the trial that their reiterated lack

of supplies was the result of defendants' refusals to deal with them and of defendants' efforts to prevent them from obtaining raw materials elsewhere. See *Royster Drive-in Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 251 (C.A. 2d, 1959), cert. denied 361 U.S. 885 (1959); *Standard Oil Company of California v. Moore*, 251 F.2d 188, 198 (C.A. 9th, 1958); *Congress Bldg. Corp. v. Loew's, Inc.*, 246 F.2d 587, 596-98 (C.A. 7th, 1957); *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F. 2d 561, 568 (C.A. 7th, 1951). This evidence is necessary in order to connect the asserted antitrust infractions with the alleged scarcity of supplies. Without such a connection, the *Bigelow* case does not come into play, for the requisite likelihood that defendants' actions caused plaintiffs' injuries is not sufficiently established to justify use of the *Bigelow v. RKO Pictures, Inc.*, supra, 327 U.S. 251, inference.

First, regarding the contract with Apex above referred to: Here, as elsewhere, the plaintiffs should have produced enough evidence to warrant a jury finding that defendants refused to sell to them and dried up other sources of raw materials.

The contract between Apex and Brignoud was executed on July 1, 1938, but it was not until the latter part of 1940 that Apex was actually ready to manufacture ferrovanadium. Between the date of the execution of the contract and April, 1940, Apex was busy seeking technical assistance from Brignoud, a task made exceedingly difficult by the growing Nazi belligerence on the other side of the ocean. This assistance was needed to determine how much aluminum should be used in the alumino-

thermic method of vanadium reduction; in other words, the amount of aluminum which, when used in the smelting process, would produce the best recovery of metallic vanadium from oxide. During this experimental period, plaintiffs made their first request for the purchase of raw materials from the defendants.

In May, 1939, and again in July and October, 1939, the plaintiff Henry J. Leir, through the Continental Ore Corporation, sought to purchase from defendant Vanadium Corporation of America certain quantities of oxide. Although these various efforts were turned down by that defendant, it is clearly in evidence that during July and August, 1939, another defendant, Electro Metallurgical Sales Corporation, a wholly owned subsidiary of defendant Union Carbide, sold to the plaintiffs 16,000 pounds of oxide. In 1939 Apex was not ready to begin making ferro-vanadium and so did not call for any oxide from Continental. The oxide which plaintiffs acquired in 1939 was sold either on the export market or to non-associated buyers in the United States. It is clear that the alleged lack of oxide during 1939 could have no bearing on the ultimate unsatisfactory outcome of the Apex agreement. What Continental wanted in 1939 was oxide to sell abroad at export prices, not oxide to be delivered to Apex for its ferro-vanadium plant, which could not use it yet.

In 1940 the story is much the same. In March Apex did make one approach to Vanadium Corporation of America seeking to buy oxide. Vanadium replied that it had no material to offer Apex at that time. Even so, during the period between September and December, 1940, Apex having first begun in August of that year to pro-

duce ferro-vanadium, Continental sold 28,000 pounds of vanadium oxide to others than Apex, which it would certainly not have done had there been a shortage either at that time or to be anticipated in the near future. If such a shortage did exist, it is hard to understand why Apex turned down proffered arrangements with the Blanding mine or with Morrison, both of which could have furnish Apex a considerable quantity of oxide. We cannot by any stretch of the imagination come to the conclusion that the refusal of Vanadium Corporation of America to sell oxide to Apex in March, 1940, contributed to a shortage of supplies at its plant.

Nor was the situation much different during 1941. We note that during that year nobody on the plaintiffs' side made any offer to buy oxide from defendants. Rather, plaintiffs wrote to defendants seeking from them offers for sale. The last of these letters was written in June, 1941, to defendant Electro Metallurgical Sales Corporation, which failed to answer. It is also in evidence that during 1941 Continental continued the practice of selling oxide indiscriminately.

Though no overtures were made to any defendant during 1942 concerning the possible purchase of oxide or ore, it is in evidence that an Apex supplier, Nisley & Wilson, sold 10,000 pounds of oxide to Vanadium Corporation of America in February of that year because Apex was unable to take that shipment owing to a fire in its ferro department.

It was not until June, 1942, that Apex canceled its joint venture arrangement with Brignoud allegedly because of the shortage of oxide resulting from plaintiffs' inability

to buy supplies from defendants and from defendants' action in preventing Apex from obtaining raw materials from other producers. As noted previously, when rejections by defendants to deal with the plaintiffs are the crux of treble damage actions under the antitrust laws, it is clearly required that the plaintiffs must show that they offered to buy and that the defendants did not sell to them. Even assuming that the failure to make offers to sell in response to plaintiffs' inquiries amounted to a refusal to deal, the last request was made a year before the alleged lack of supplies is claimed to have caused Apex to end its relationship with the plaintiffs. We hold, under the cases cited pages 8-9, *supra*, that the failure of Apex or of Continental to try to buy oxide from the defendants during the final and most critical period in the life of the Apex contract made it impossible for the jury to find that defendants' refusals to deal caused Apex to terminate the arrangement with Brignoud. In regard to the Apex venture, the judgment below is affirmed.

We come now to the plaintiffs' efforts to market the Van-Ex compound. Some Van Ex had been made by Apex before relations with Brignoud finally came to an end in July, 1942. But most of this product was manufactured by Continental in rented premises in Long Island City, New York. According to the allegations of the complaint, the sales of Van-Ex were completely stopped in 1944 for the reason that, because of the defendants' wrongdoing, Continental was never able to secure sufficient supplies of raw materials to stay in business. The defendants contended that the manufacture of Van-Ex really stopped in 1943, when Continental sold its pebble mill.

The complaint itself is somewhat confusing as to why the Van-Ex business fell off. One paragraph states that the cause of this disaster was the inability of the plaintiffs to secure raw materials through defendants' wrongful acts. Another paragraph asserts that the plaintiffs were shouldered out of the vanadium field, and specifically out of Van-Ex, by defendants' interference with Continental's primary customer for Van-Ex, Atlas Steel, Ltd., of Canada. Defendants are accused of preventing Atlas from securing Van-Ex from Continental. It seems obvious that, if lack of supplies was really the cause of Continental's undoing with regard to Van-Ex, the loss of Atlas as a customer would become irrelevant, for the absence of customers cannot hurt a seller who has nothing to sell. On the other hand, if the defection of Atlas was the cause of Van-Ex's demise, the alleged lack of supplies could have had no relevance, for an abundance of goods is of no use to a seller who lacks customers.

As to the lack of supplies needed to produce Van-Ex, the plaintiffs once again have the burden of introducing sufficient evidence to warrant the inference that they were unable to obtain oxide from the defendants or from anybody else.

The Van-Ex venture must be viewed against the background of wartime regulations and procedures. Metals Reserve Company (hereinafter MRC) was formed by the United States Government in the early months of 1942 to insure that vanadium for the war effort would be readily available when needed. MRC named defendant United States Vanadium Corporation its agent to carry out the appointed task. MRC and United States Vana-

dium Corporation had three plants at their disposal for milling oxide from ore, one run by the latter at Durango, Colorado, one by Vanadium Corporation of America at Monticello, Utah, and, toward the end of 1942, the Nisley & Wilson mill at Gateway, Colorado. These three plants processed ore furnished by United States Vanadium Corporation as agent for MRC, and the oxide produced was turned over to MRC for a fee or "toll" on each pound.

The oxide accumulated by MRC in this manner was then sold to private interests, provided the prospective buyer could receive an allocation from the War Production Board. There is no evidence that Continental had any trouble obtaining such allocations. By the end of 1943 MRC to all intents and purposes had stopped functioning. At that time the Manhattan Project, designed to make the first atomic bomb, began operations. Since uranium comes from the same ore as vanadium, control over vanadium ore was assumed by the Manhattan Project. So far, however, as can be inferred from the record, the manipulations by the Manhattan Project and by its agent, Union Mines Development Company, a wholly owned subsidiary of defendant Union Carbide, did not come into play until after the Van-Ex project had come to an unsuccessful close.

In March, 1943, Continental was granted an allocation for 20,000 pounds of oxide from the War Production Board. MRC supplied 10,000 pounds and the balance was purchased from the defendant Electro Metallurgical Sales Corporation. In making this purchase from Electro, Continental squabbled somewhat over the price but eventually the sale was made at the price offered by Continental.

Later in the same year Continental asked defendants Electro Metallurgical Sales Corporation and Vanadium Corporation of America for contracts under which it could buy from them a certain amount of oxide each month over a prolonged period, but the requests were turned down. Again, we must assume that the denial of these requests for contracts amounted to a refusal to deal with the plaintiffs.

None the less, appellants failed to show that defendants prevented them from buying raw materials from an independent supplier, namely, Nisley & Wilson. Late in 1942, at the beginning of that firm's toll agreement with MRC, some of its production was earmarked and sent to Continental through MRC. These shipments apparently stopped early in 1943. In the spring of that year MRC entered into a contract with Continental under which the production of Nisley & Wilson, or a part of it, would be shipped to Continental from time to time. In June 17,000 pounds of oxide were ready, but Continental did not wish to buy for the reason that the oxide was in lumps and Continental needed material more finely ground. Continental had bought these lumps from Nisley & Wilson in the fall of 1942 but did not want them in the summer of 1943. This may have been because Continental had sold the pebble mill which it had begun to operate in Long Island City in 1942. Moreover, because in the summer of 1943 Nisley & Wilson could not have produced oxide in forms smaller than the lumps unacceptable by Continental, the latter canceled its contract with MRC.

In October, 1943, Nisley & Wilson foresaw the end of its toll agreement with MRC and installed a flaking ma-

chine. It could now produce oxide in flakes rather than in lumps. Continental was advised of the new acquisition and a sample of oxide in the new form was submitted. Continental replied that the flakes were just what the doctor ordered, but made no effort to secure Nisley & Wilson's product. Plaintiff's witness Martin Wolf testified that this was because Continental did not know that the toll agreement was about to expire and thought that it would not be able to get anything from MRC which, says Continental, was controlled by its agent United States Vanadium Corporation. Nisley & Wilson shut down in January, 1944. It had on hand a stockpile of about 300,000 pounds of oxide which it tried to sell to Continental in the spring of 1944. Again Continental refused to buy.

We think this failure to deal with Nisley & Wilson during the Van-Ex period precludes Continental from arguing that defendants prevented the acquisition of raw materials at that time. As to Apex, appellants failed to show their inability to get oxide from defendants. With regard to Van-Ex, they failed to show that it was impossible for them to obtain supplies from an independent producer.

As to the alternative allegation, that the loss of the Van-Ex business was caused by the defendants' interference with Canadian buyers, principally Atlas Steels, Ltd., we cannot ignore the fact that Electro Metallurgical Company of Canada, Ltd., had been appointed by the Canadian Government to act as its agent in purchasing Van-Ex for Canadian steel makers. The Canadian Government established a regulation under which no vanadium oxide

(including Van-Ex) could be imported into Canada by anybody other than its agent, and Electro Metallurgical Company of Canada, Ltd., refused to purchase Van-Ex from the plaintiffs. Thus, even if we assume that Electro Metallurgical Company of Canada, Ltd., acted for the purpose of entrenching the monopoly position of the defendants in the United States, it was acting as an arm of the Canadian Government, and we do not see how such efforts as appellants claim defendants took to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, decided by the Supreme Court February 20, 1961.

We now refer briefly to the two remaining allegations of the complaint designed to show that the defendants' illegal acts caused a failure of the plaintiffs to compete successfully in the ferro-vanadium field.

During 1943, by threats of reprisals made by one M. D. Arrouet, defendants allegedly forced the termination of contractual negotiations between Climax Molybdenum Corporation and the plaintiffs. The trial judge excluded all evidence dealing with the alleged threats of reprisal; therefore we look to appellants' offer of proof to determine what the story was. Appellants offered to demonstrate that Mr. Arrouet was a highly placed representative of defendants Union Carbide group. It is admitted that he was not an officer of any of the defendants, but it is alleged that his threats of reprisals ought to bind Union Carbide and Electro Metallurgical Company. Appellants' offer of proof would show that Arrouet threatened that if Climax undertook the manufacture of ferro-

vanadium for Continental, the defendants would enter the industry as a reprisal against Climax.

For present purposes we shall assume that Arrouet said what appellants say he said, and we shall also assume that his statement is to be considered the statement of those defendants in the Union Carbide group. The difficulty with appellants' position in this regard is that the record contains no evidence of the nature of the alleged pending negotiations with Climax. There had been, in February, 1943, an earlier arrangement between Continental and Climax, which it appears was completed. By the end of April, 1943, Continental had shipped the agreed poundage of vanadium oxide to Climax, and Climax had converted this material in accordance with its part of the bargain. This earlier transaction stands alone in the record as the only connection between Climax and Continental. Thus even if Continental and Climax were threatened with reprisals, the evidence does not reveal the result of such threats. On the basis of the evidence in the case, the threat of reprisal appears to be one directed against a corporation with which Continental had no business, since the nature and existence of the alleged "pending negotiations" are not shown by the record. Appellants have thus failed to show any injury resulting from the alleged threats. There must be an injury, together with a wrong and a causal connection between the two, before liability can result.

The remaining instance given in the record is the so-called Imperial venture. On January 4, 1944, Continental Ore Corporation and Imperial Paper & Color Corporation, incorporated in New York, entered into a contract

calling for the manufacture of vanadium products. Continental was appointed the exclusive sales agent for these products. Imperial was to pay Continental a commission on all sales made. Imperial was also to install the necessary equipment and give Continental the first opportunity to supply Imperial's total requirements for raw materials. Imperial had some raw materials of its own as by-products of its other business. The Continental-Imperial contract was made contingent upon the decision of Imperial to manufacture vanadium from other raw materials than its chromite by-products. If Imperial should decide not to enter this new field of production, the contract was to become null and void.

This is exactly what transpired. In December, 1944, Imperial wrote Continental that it was not yet willing to begin the manufacture of ferro-vanadium as called for in the contract between them. It is clear from this letter that Imperial was worried over the sources of supply of vanadium-bearing raw materials. Similar letters from Imperial to Continental were written on April 9, April 13, and May 11, 1945. Sometime during 1945 Imperial decided not to go into the ferro-vanadium venture with Continental and chose to exercise its right under the contract to call the agreement off. The arrangement never got started. Imperial did not install the necessary equipment and no ferro-vanadium was produced.

The various communications from Imperial to Continental show clearly that Imperial was dissuaded from entering this field because of the lack of sources of raw material. It is the appellants' position that they could not get a steady, uniform supply of raw materials because of

defendants' alleged antitrust infractions. There is a great deal of evidence showing that various sources of vanadium other than vanadium oxide mined on the Colorado plateau were available to Continental during the life of the Imperial contract. These included lead vanadate from Africa, vanadium ash from Peru, flue dust from ocean-going vessels burning certain Venezuelan and Mexican oils, and something called cuprodescloizite ores. Mr. Wolf, the vice-president of Continental, testified that it would be almost impossible to produce vanadium from these raw materials unless they could be gotten in a steady and uniform manner. Be that as it may, the evidence in regard to the period of the Imperial venture shows the failure on the part of appellants to offer to buy raw materials from the defendants. As we have observed in regard to the Van-Ex venture, both Electro Metallurgical Sales Corporation and Vanadium Corporation of America turned down requirements contracts with Continental late in 1943. At this time the supplies of Nisley & Wilson were available to Continental and were not procured from that firm. The Imperial contract was entered into in January, 1944, and cancelled sometime in 1945. Yet from the end of 1943 until 1946, when Electro Metallurgical Sales Corporation gave Continental a requirements contract for vanadium oxide, appellants made no move to obtain the allegedly necessary steady and uniform source of supply from any of the defendants. This is much like the Apex situation except that here there were no offers to buy during the entire life of Continental's arrangement with Imperial. Surely Continental cannot complain that the defendants did it wrong when it cannot show that it sought

to alleviate its situation by seeking supplies from the defendants at any time during the life of the Imperial venture.

A judgment will be entered affirming the judgment of the District Court.

(Endorsed) Opinion Filed March 22, 1961.

Frank H. Schmid, Clerk.

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 16,149

Continental Ore Company, et al.,
Appellants,
vs.
Union Carbide and Carbon Corporation,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the appellees and against the appellants.

It is further ordered and adjudged by this Court that the appellees recover against the appellants for their costs herein expended, and have execution therefor.

(Endorsed) Judgment filed and entered March 22, 1961.
Frank H. Schmid, Clerk.

Appendix C

United States Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Monday, May 15, 1961.

Before: Magruder, Merrill, Circuit Judges, and Solomon, District Judge.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants filed April 21, 1961, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

Appendix D

Section 1. Sherman Act

July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U.S. Code, Sec. 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Section 2. Sherman Act

July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Public Law 135, 84th Congress, 1st Session; 15 U.S. Code, Sec. 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4. Clayton Act

October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731; 15 U.S. Code, Sec. 15.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the

United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

CONSTITUTION OF THE UNITED STATES
AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C., Section 2072, Fed. Rule Civ. Pro. 50(b):

Section 2072. Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States and of the District Court for the Territory of Alaska in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

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Federal Rule of Civil Procedure, 50(b) provides:

Rule 50.—MOTION FOR A DIRECTED VERDICT

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(b) *Reservation of decision on motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Appendix E

PLAINTIFFS' EXHIBIT 51 FOR IDENTIFICATION

(Excluded by the Trial Court)

COPY

U. S. Vanadium Corporation, New York City.

Mr. F. P. Gormely, March 25, 1936.
Room 1715, Building.

Messrs. F. H. Haggerson, VANADIUM SITUATION
W. H. Sneath, Vanadium Corp. of America.
J. M. Price.

Dear Mr. Gormely:

On Monday I had a talk with Mr. Bransome and Mr. Rees of the Vanadium Corporation of America in reference to the purchase of some of the equipment now at their Naturita Plant for use in our Paradox Valley Plant at Uravan. Previous conversations in regard to the use of the Naturita Plant were reviewed by Mr. Rees and myself for the benefit of Mr. Bransome.

It was then brought out that we had selected the Uravan Plant site for purely economic reasons. I explained that Uravan was 15 miles closer to rail at Grand Junction, which railroad point enabled us to use the new Dolores River road, thereby shortening the hauling on finished product and supplies. Also, the Uravan site was more central to our ore supply, and the saving in hauling alone would, practically, build the plant. I further explained that with our manufacturing process as it had been developed, the Naturita Plant would have to be entirely rebuilt with the exception of the single roaster installation. I stated that there was some of the equipment in the Natu-

rita Plant which we could use, and would be glad to consider its purchase; also, such ore supplies as they had available.

The outcome of this discussion was that at the present time the Vanadium Corporation of America would not consider dismantling their Naturita Plant and would keep their investment intact. They would consider the leasing of the Plant or an outright sale. This subject was not discussed further, because the Naturita site is not desirable for economic reasons, and the fact that the Vanadium Corporation of America have an exalted idea of the value of the Naturita Plant, regardless of the operating failure they have already experienced.

The discussion then turned to the vanadium situation in general. Mr. Bransome stated a reduction in price of V in ferrovanadium is indicated, but that a small reduction would do no good; and that their cost of producing vanadium was so high a considerable reduction could not be made. I asked him what he thought would be a "considerable reduction", and he said to $2.25 or $2.10 per pound. He went on to say that with the fused oxide costing him 80¢ per pound there was little profit in vanadium at the present prices. It developed when he was roughly casting up these figures, that in their present practice it requires 2.2 lbs. of V_2O_5 to make 1 lb. of V in ferro.

Mr. Rees is the Vice President of the Vanadium Corporation of America, and a Mining Engineer. He is responsible for the Peruvian operation. He told Mr. Bransome that our costs at Rifle were between 60¢ and 70¢ per pound of V_2O_5, and assumed it as being 65¢. With this assumption he considered 80¢ per pound was about

as cheap as we could be expected to sell fused oxide from our present stocks. I stated that the Rifle production was, probably, cheaper than the Peruvian production in any case—to which he made no reply.

In regard to the Peruvian production I said it was evident they had resumed operations in Peru, judging from the amount of concentrates they had been importing over the last few months, which amounted (up to February 1st) to 709 tons containing an equivalent of, approximately, 230,000 pounds of V_2O_5 in fused oxide.

Mr. Bransome stated in answer to this that they had resumed operations in Peru on a reduced scale and expected to continue this production all this year. He said the object of this operation was so he could find out exactly what the production cost; that some economies were being put into effect; and that the figures of the past operation were not clear, and he was finding out the facts for himself. The same crew is operating, and Charlie Fritz is still in charge.

Apparently, there has been much discussion between Mr. Bransome and Mr. Rees in reference to a purchase contract with us, because Mr. Rees called to Mr. Bransome's attention the fact that the Rifle production at 65¢ per pound V_2O_5 included a high depletion charge. Mr. Rees said we had purchased the Rifle properties at a relatively high figure and that his estimate was the depletion charge must have been about 25¢ per pound. He further stated that our Paradox Valley investment was relatively small and the depletion charge would, practically, be negligible —so costs at the Uravan operation would be somewhere

between 40¢ and 50¢ per pound. He inferred they could not hope to secure this cost in Peru and, apparently, they have had many discussions about this Peruvian operation, and I am under the impression that Mr. Rees is not in favor of it. I asked how much V_2O_5 they would produce in Peru this year and they replied, probably about 500,000 pounds, but the production would depend upon the success of the operation as they planned it.

Mr. Bransome stated he believed in laying his cards on the table in regard to vanadium production, that he knew he could not fool us, and any other attitude would be foolish to take. He said when he found out what his costs were going to be in Peru, he believed it would be advantageous for all concerned to get together on one production operation. He said that by the time he was ready to discuss this situation we would, probably, know just what our costs would be at the Uravan Plant. Mr. Bransome asked what our costs at that Plant would be. I told him we were in no position to make any definite statement as to this cost at this time, because we were making some changes in the process and were not certain as to how these changes would affect the costs.

Mr. Bransome stated many times that he was very anxious to reduce the cost of V_2O_5 production to a point where a considerable reduction in the sales price of V in FeV could be made. In this respect I said that there seemed to be a difference of opinion as to the advisability of reducing the sales price of vanadium as to its effect upon sales. Mr. Bransome said his contacts with the steel people seemed to indicate that a considerable reduction would stimulate the use of vanadium.

The vanadium production contemplated by the Molybdenum Corporation of America at their Mammoth operation, was discussed and Mr. Bransome wanted to know what I knew about it. I reviewed the Mammoth operation as I knew it—which was to the effect that so far the production of vanadium and molybdenum at the Mammoth had been uncertain and disappointing, but that they planned to build a new mill and could recover, according to my figures, approximately 300,000 pounds V_2O_5 yearly. This production would be in the form of a lead-molybdate and lead-vanadate concentrate containing gold and silver.

I told them that information I had was to the effect that the Molybdenum Corporation had not been very successful in separating the vanadium and molybdenum from these concentrates. Mr. Bransome said that Mr. Hirsch had been to see him a couple of times about reducing these concentrates for him and purchasing the vanadium. Mr. Bransome said he had not been able to find out from Mr. Hirsch how much vanadium product or residue he actually had at present, nor in what form it was—and wanted to know what information I had on this subject. I told him my information was not sufficient to definitely state either the amount or form of the vanadium, but that I thought the vanadium was, at present, in the form of a sodium vanadate slag also containing the molybdenum, and that the molybdenum in the slag equalled about twice the vanadium content. This was the opinion of Mr. Rees also, and he stated his information on this was to the effect that the work so far carried on by the Molybdenum Corporation

on these vanadium-molybdenum concentrates had resulted in a very high cost for recovery of these metals.

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My impression gained from this talk with Messrs. Bransome and Rees was that the Vanadium Corporation is in somewhat of a state of confusion regarding their vanadium production. It is evident that they must obtain a cheaper source of vanadium, and will use as a threat the possibilities at both their Peruvian and Naturita properties in negotiating lower prices with us the latter part of this year.

An interesting fact indicated from this conversation was that, apparently, their process for making ferro-vanadium is not as efficient as ours. It requires 2.2 lbs. of V205 for 1 lb. of V in FeV. We roughly figure 2 lbs. in our process, but the actual experience is approximately 1.9 lb. V205 for each pound of V in ferro.

The actual situation with us in the Paradox Valley is that we estimate we will be able to produce V205 for 40¢ per pound including depreciation and depletion charges, without taking any credit for uranium production. We will, at this operation, produce U308 residue as a by-product--the amount of U308 residue produced will depend upon the ores processed.

We have ores containing a high uranium content and by selective mining we can make this production, approximately, as desired. There is a market in the United States for about 250,000 pounds of U308 yearly--which is mostly imported from Belgium. It is thought that we can readily sell about 100,000 pounds of U308 yearly, principally to

the Vitro Manufacturing Company of Pittsburgh, who have already expressed a desire to purchase their supply from us. The profit on U3O8 should be about $1.00 per pound and with this credit against the vanadium production the cost of V2O5 would be about 30¢ per pound.

There are, also, possibilities with radium in making a low-grade radium sulphate residue as a by-product from the Uravan production; or it is possible to make a uranium-radium residue and be paid for the radium accordingly. This radium production, however, is uncertain and we have not estimated any credits therefrom.

Very truly yours,

ew/J. R. Van Fleet
IC
Extra cc for Mr. Gormely.

PLAINTIFFS' EXHIBIT 62 (Part)

Special Report
Gustav Laub — February 20, 1942

Apex Smelting Company
Chicago, Illinois
Mr. Edward S. Christiansen—Vice Pres.

Mr. Christiansen, Vice President of the above company, whom I have known slightly for sometime, called on me stating that they have decided to go out of the Vanadium business and that they had certain equipment and some small stock of Oxide on hand that they would like to dispose of if we were interested.

He did not have an actual list of the equipment nor of the raw materials they have on hand but from the figures he had it looked as though they have close to 50,000 pounds

of Vanadium Pentoxide containing between 78/87% V205 and about 40,000 to 50,000 pounds of Magnesite.

I told him that we might be interested in the Vanadium Oxide and possibly the Magnesite and some of the equipment which included jaw crushers and miscellaneous equipment. He promised to obtain from their Chicago offices an actual complete list of the equipment they have to offer as well as the quantities and grades of Vanadium Oxide and Magnesite and to deliver these to me the early part of next week. I told him that I would then refer this to the proper parties of our company and that we would probably be interested in the Vanadium Oxide and the Magnesite if their prices were right. He stated that they would be reasonable in their prices and did not expect to make a profit.

Mr. Christiansen further stated that they had been contemplating going out of the Vanadium business for sometime and their definite decision was reached for two reasons. First, that they had a fire in this department of their plant and secondly, that the sales contract which they had with Mr. Leir, President of the Continental Ore Corporation had not worked out very well. Mr. Leir was getting a fifty percent cut on the profits. Mr. Christiansen also stated that they had some agreements with the Shattuck Chemical Company and Niley & Smith for deliveries of Vanadium Oxide and that he would also look into this and advise us of the status thereof.

GL:KSW

Vanadium Corporation of America
Inter-Office Communication

To Mr. E. D. Bransome, President
Subject Apex Smelting Company
Chicago, Illinois

Date March 14, 1942
From Gustav Laub

Inasmuch as the following information has been conveyed verbally this memorandum therefore is for our records.

With reference to the writer's memorandum of February 20th advising that Mr. Christiansen, Vice President of the above company, had informed us that they were going out of the Vanadium business and had offered us their stocks of Vanadium raw materials, equipment, etc. as I had not heard further from Mr. Christiansen in this regard I had Larry Johnson casually contact him by phone and tell him that I had not received the information that he promised to send.

As a result, Mr. Christiansen phoned the writer and stated that in going into the matter further they had run into some legal difficulties. Mr. Leir, President of the Continental Ore Corporation, with whom Apex has an agreement to furnish their entire production of Vanadium, he acting as sales agent, objected strenuously to their breaching their contract and upon referring the matter to their counsel Apex were advised that Mr. Leir had a strong case against them and to make the most satisfactory arrangement with Mr. Leir that they could.

This resulted, Mr. Christiansen advised, in Mr. Leir putting a proposition up to them in that they would produce Vanadium at full capacity for a period of three months after which time he would take over their equipment and raw materials contracts and produce the material himself.

Mr. Christiansen therefore advised that they felt they would be obligated to produce at maximum capacity for a period of three months and had decided to proceed on this basis but that they had not come to a definite conclusion about turning over the equipment and raw materials contracts after that time. The contract with Mr. Leir, he said, extended over the balance of the calendar year.

In event that the second part of Mr. Leir's proposition does not go through Mr. Christiansen stated that they still proposed to offer us such raw materials as they have available as well as plant equipment.

The above information, at your suggestion, was conveyed by phone to Mr. E. K. Jenekes, Assistant Chief, Vanadium Branch, War Production Board.

GL:KHW

Special Report

Gustav Laub April 14, 1942

Apex Smelting Company

Chicago, Illinois

Mr. Edward S. Christiansen—Vice President

With reference to the writer's previous report of February 20th, Mr. Christiansen of the above company called again yesterday stating that they had now gotten their Vanadium situation straightened out and that they had definitely concluded to dismantle their Vanadium plant

at once and go out of the Vanadium business permanently. The equipment from their plant is now for sale. He doubted whether there would be much of the equipment that might interest us but said that the list of same would be sent to us promptly.

Mr. Christiansen stated that they had finally been able to come to an agreement with Mr. Leir of the Continental Ore Corporation, with whom they had a 14 year contract, to cancel the same. By doing so it was necessary for them, he said, to produce only enough Ferro Vanadium to complete two open orders which Mr. Leir had on his books and to continue producing Vanex (a mixture of Oxide and Aluminum which they have been supplying) up through June after which time they would be completely out of the Vanadium picture. Mr. Christiansen further stated that their contract and dealings with Mr. Leir had not proven at all satisfactory to them and that they regretted ever having gone into the business.

He further stated that he would furnish us with the names of all of their suppliers of Ores and Oxide; the principal ones apparently being Shattuck Chemical Company, and Nisley & Wilson. He appeared to be most anxious that we obtain these raw materials rather than the possibility of Mr. Leir's getting them and continuing in the Vanadium business.

We had an interesting discussion concerning low copper grained aluminum which they produce and release with necessary priority approval and I therefore turned him over to our Purchasing Department with regard to this item.

G. L.

ESC

Appendix F

ERRORS RAISED TO COURT OF APPEALS

(a) Alleged Errors as to Instructions

1. The trial court erroneously instructed the jury that proof of injury to the plaintiffs was not sufficient to warrant recovery under the antitrust laws, but that plaintiffs must, in addition, prove that the violation of the antitrust laws involved was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce, and that even if the jury should find that there were acts of defendants directed at plaintiffs alone, this was not sufficient. (Tr. 2035-2036.) This instruction was based on the Ninth Circuit Opinion in *Klor's Inc. v. Broadway Hale Stores, Inc.* (9 Cir. 1958) 255 F.2d 214, which was reversed by this Court in 359 U.S. 207 (1959).

2. The Court erroneously instructed the jury that individual business judgment was a defense to violation of the antitrust laws without qualifying this instruction by adding "in the absence of a conspiracy" or "in the absence of a purpose to create or maintain a monopoly". (Tr. 2028-2029.) This was alleged to be in conflict with this Court's Opinion in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and the opinion of the Ninth Circuit in *Fox West Coast Theatres Corp. v. Paradise T. Bldg. Corp.* (9 Cir. 1958) 264 F.2d 602.

3. The Court erred in not telling the jury, in answer to the question addressed to the Court by the jury, that if 95% of the sources of supply held by defendants was acquired pursuant to a conspiracy to achieve that end,

that this fact standing alone was a violation of the antitrust laws, and by not informing the jury that the antitrust laws condemn such power if it is held by one company or if held by two companies pursuant to an agreement to achieve the monopoly. (Tr. 2048-2050.) Appellants claimed that the opinion of the Second Circuit in *United States v. Aluminum Co. of America* (2 Cir. 1945) 148 F.2d 416, as approved by this Court in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) was controlling.

4. The Court erred in giving an instruction that the defendants were immune from antitrust violations as to any actions taken in the scope of their duties on behalf of the Government of the United States or on behalf of one of its agencies or services, and that said actions could form no proper part of plaintiffs' proof of conspiracy to monopolize or restrain trade in the case. (Tr. 2033.) Plaintiffs claimed this instruction to be in conflict with this Court's opinions in *American Tobacco Co. v. United States, supra; United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *State of Georgia v. Pennsylvania*, 324 U.S. 439 (1945), and the decisions of various Circuit Courts.

5. The Court erred in instructing the jury without qualification that plaintiffs had to prove with reasonable certainty that they would have had vanadium products to sell and would have sold them at a profit, and, further, that plaintiffs had an obligation to accept all offers of vanadium oxide at prices which would not have permitted them to operate at a profit. (Tr. 2032, 2034.) It was claimed by appellants that these instructions imposed a

greater standard of proof than required under the facts of the case and under the decisions of this Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *W. M. Montague & Co. v. Lowry*, 193 U.S. 38 (1904) and the current decisions in *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (1 Cir. 1952) 194 F.2d 484; *American Federation of Tobacco Growers v. Neal* (4 Cir. 1950) 183 F.2d 869.

6. The Court erred in not giving an instruction that a conspiracy to refuse to deal is illegal per se. (Tr. 2028; Instr. No. 10, Tr. 54.)

7. The Court erred in giving instructions as to damages in conflict with this Court's opinion in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). (Pls.' Proposed Instructions Nos. 15, 16, 17, 19, 20, 21, 22 and 24, Tr. 58-65, 67.)

(b) Alleged Errors as to the Exclusion of Evidence by the Plaintiffs

1. The Court erred in excluding evidence of the defendants' net sales, total cost of net sales, and profit before federal income and excess profits taxes pertaining to vanadium, uranium and their respective compounds for the period January 1, 1933 to and including December 31, 1947. These figures were tabulated by the defendants themselves in answer to plaintiffs' interrogatories and are set forth in Pls.' Ex. 20 for Identification. (Tr. 129-130, 134.) The admissibility of profit figures of defendants was alleged to be required by this Court's opinion in *American Tobacco Co. v. United States*, *supra*.

2. The Court erred in excluding evidence offered by plaintiffs to show the origin, nature, scope and purposes

of the alleged conspiracy between defendants. The exhibits offered related to the period prior to 1938 but were offered to show the origin of the conspiracy between defendants to control the vanadium industry which began prior to 1938 and continued after 1938 through the period for which plaintiffs claimed damages. The offer of proof as to the pre-1938 documents appears at Tr. 422-433. See Pls.' Ex. 47 for Id., Tr. 308-316, 1025-1026, 1447-1452, 1461-1463, 1477-1478; Pls.' Ex. 48 for Id., Tr. 316-318; Pls.' Ex. 49 for Id., Tr. 319; Pls.' Ex. 50 for Id., Tr. 319-320; Pls.' Ex. 51 for Id., Tr. 320-321 (Appendix E herein); Pls' Ex. 52 for Id., Tr. 321-322; Pls.' Ex. 53 for Id., Tr. 323; Pls.' Ex. 54 for Id., Tr. 323; Pls.' Exs. 67A to 67F, Tr. 601-627, 626-627. Plaintiffs claimed that the exclusion of the pre-1938 documentary evidence which corroborated Mr. Burwell's testimony was in conflict with this Court's opinion in *American Tobacco Co. et al. v. United States, supra.*

3. The Court erred in excluding patents held by VCA relating to the direct reduction of vanadium oxide by the use of fluorspar or aluminum in a steel bath, a practice challenged by respondents. The patents were offered as Pls.' Exs. 169 and 170 and were rejected at Tr. 1929-1935.

4. The Court erred in not permitting plaintiffs to prove the elimination of their Canadian business in 1943. The exhibits pertaining to this issue were marked as Pls.' Exs. 80 to 109 for Id. and offered at Tr. 801-840. With the exception of Exhibits 92 and 93, these exhibits are letters or telegrams between Continental Ore and Electromet of New York and Electromet of Canada during 1943 and early 1944 which show that Electromet of

Canada, an affiliate of Union Carbide, would not honor plaintiffs requests to ship Van-Ex or ferro-vanadium to steel companies in Canada. Continental Ore had approximately 12,000 pounds of its Van-Ex available for delivery to Canadian steel mills. However, except for 5,000 pounds shipped directly to Atlas Steels, they were unable to obtain an allocation permit from Electromet of Canada, which had been appointed to handle the allocation of vanadium supplies in Canada by the Canadian Government. The refusals of Electromet of Canada to honor Continental's requests for allocation are contained in Plaintiffs' Exs. 91, 100, 102, 104, 107 for Id. The offer of proof as to the statements of Mr. Arrouet is discussed in this Petition at pages 25-26 and appears at Tr. 813-817, 1008-1012. The identification of Mr. Arrouet and the circumstances of the conference between Mr. Wolf and Mr. Arrouet appears at Tr. 845-851.

The refusal of the Court to allow appellants to introduce this evidence was claimed to be in conflict with *United States v. Sisal Sales Corporation*, 274 U.S. 268 (1927); *Baush Machine Tool Co. v. Aluminum Co.* (2 Cir. 1934) 72 F.2d 236; and *United States v. Aluminum Co. of America*, *supra*, at 439-445.

5. The Court erred in not permitting plaintiffs to introduce evidence as to the extent of damages suffered by plaintiffs. This evidence included plaintiffs' business statements, tabulations showing plaintiffs' success in free allied markets and the expert opinions of plaintiffs. The financial statements of plaintiffs are identified as Pls.' Exs. 121 and 123. (Tr. 1083-1088; 1095-1096.) Plaintiffs' tabulations showing their success in other business lines,

including the sale and distribution of aluminum, barytes, coal derivatives, phosphates and magnesia products, deemed comparable to the sale and distribution of vanadium products for the period 1938-1957 were identified as Exhibits 124, 125 and 126. These were offered and rejected at Tr. 1097-1107.

The trial Court rejected the expert testimony of Mr. Leir at Tr. 1103-1114; it rejected the expert testimony of Mr. Wolf at Tr. 851-867. The rejection of the expert testimony of Dr. L. Vance, Professor of Accounting, University of California, and exhibits offered by him, appear at Tr. 1261-1266, these being Pls.' Exs. 139, 140, 141 for Id.

Appellants urged that this evidence was admissible under *Bigelow*.

(c) Errors in the Conduct of the Trial

Appellants also urged that the Court erred in unduly interrogating plaintiffs' witnesses, unduly commenting on the evidence, unduly interrupting examination and cross-examination of plaintiffs' witnesses with statements, comments and interrogations prejudicial to the plaintiffs' case. The following references were claimed to support this error:

(a) excessive statements that evidence admitted is of doubtful materiality (Tr. 221, 249, 325, 599, 751, 753, 1323, 1324, 1581, 1603, 1621, 1644, 1646, 1656, 1801, 1909-1911, 1924, 1979, 1984);

(b) unduly commenting on or interrogating the witnesses by leading questions, that direct testimony of the exclusion of competition or the elimination of competition by defendants was based on sound or

good business judgment (Tr. 209, 245, 246, 255, 558, 559, 561, 586, 869, 1647, 1709, 1833);

(c) unduly commenting on, or interrogating extensively, as to governmental involvement in some of the matters in issue (Tr. 293, 455, 664, 703, 727, 745, 746, 747, 760, 1080);

(d) stating in the jury's presence of the need to prove an express formal agreement or formal corporate approval before violation of the antitrust laws may be found (Tr. 563, 611);

(e) commenting favorably on the witnesses of defendants (Tr. 1454, 1455, 1461, 1465, 1487, 1492, 1826), but subjecting plaintiffs' witnesses to undue examination (Wolf, Tr. 956, 971, 978, 980; Leir, 1130);

(f) unduly commenting on an asserted lack of proof by plaintiffs (Tr. 1413, 1414, 1422, 1581, 1804, 1904, 1910-1911, 1962-1963).

(d) Errors by Counsel

Plaintiffs alleged that prejudicial error was committed when counsel for VCA informed the jury in his opening statement that the defendants had been acquitted by a jury in a prior government criminal action. (Tr. 111, 315.) Counsel for plaintiffs had objected to the statement in a prior conference in the Court's chambers. This conference was unreported. (See Tr. 1988 and the trial Court's instruction at Tr. 2037.)